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From:

Sent: [2/17/09]

To:

Cc:

Subject: Disclosure question

I do not have any recollection of any prior contact on this matter. I also do not know who you may have dealt with (to pass on to whoever is the appropriate recipient). And I do not now comment on the attorney rules of conduct that you received in prior advice. But the subject matter of your inquiry is within my jurisdiction so I am responding to your inquiry.

You ask whether individuals treated as independent contractors by the employer but subject to dispute as to whether they qualify as employees should be treated as third-party contacts or as employees when interviewed.

Treas. Reg. ' 301.7602-2(c)(2)(i) explains that the phrase "person other than the taxpayer" and "third party" are interchangeable and identifies certain contacts that are not considered to be third-party contacts. Contacts with a current employee of a taxpayer acting within the scope of his or her employment are not considered to be contacts with third parties. Such employees are presumed to be acting the scope of his or her employment during business hours or business premises. Treas. Reg. ' 301.7602-2(c)(2)(i) (C).

Research did not reveal any dispositive pronouncements from the Service nor case law that addressed the issue you raise about whether the Service considers contested independent contractors as employees for purposes of the third-party contact rules. As indicated above, typically employees contacted during business hours on business premises are not third-party contacts. Nevertheless, the IRM suggests that the best practice would be to allow the taxpayer to identify which employees are authorized to speak for the taxpayer and treat the remaining employees as third-party contacts. The IRM also suggests that when there is doubt, the examiner should discuss the situation with the designated Third Party [sic] Contact Coordinator for the examiner's area. You do not indicate whether this was pursued. IRM 4.11.57.3.

Presumably the employer has not identified the putative employees as authorized to speak for the taxpayer. Consequently, consistent with the IRM, we should treat them as third-party contacts. You should also contact your Third-Party Contact Coordinator.

You also ask about whether we have to identify who we actually interview from a list of potential third-party contacts, our obligations to those who fear reprisal and our use of information from those who fear reprisal.

Treas. Reg. ' 301.7602-2(d)(1) provides that the Service cannot make any third-party contacts without first providing reasonable notice to the taxpayer that contacts may be made. Such notice can be made orally or in writing and essentially may be given in any reasonable manner. Section 301.7602-2(e)(1) provides that a taxpayer may request a record of persons contacted in any manner that the Commissioner reasonably permits, i.e., the Commissioner may set reasonable limits on the frequency.

Section 301.7602-2(e)(2)(i) provides that the record of persons contacted should contain information which reasonably identifies the person contacted. The record need not contain any other information such as the nature of the inquiry or the content of the third party's response. The record also need not report multiple contacts of the same person during a reporting period. There is a special rule regarding the contacting of employees who are acting within the scope of their employment. For those employees, the contact record need only disclose the business entity. Treas. Reg. ' 301.7602-2(e)(2)(ii).

Treas. Reg. ' 301.7602-2(f)(3)(i) provides that the Service need not provide advance notice of contact nor include information on a contact record if the Service has good cause to believe that providing the taxpayer with that information may cause any person harm whether the harm is physical, economic, emotional or otherwise. IRC ' 7602(c)(3)(B). A statement by the person contacted that harm may occur is sufficient to constitute good cause for the Service to believe that reprisal may occur and no further inquiry about reprisal is necessary.

Based on our regulations, the Service would need to provide a contact list prior to any contacts with third parties. Upon request of the taxpayer, the Service would need to provide a contact record indicating the names, if known, of those contacted (and if not some kind of identifying information, e.g., your neighbor). Even though there is a special rule when contacting employees, since we have advised that we should treat questionable employees as third-party contacts (unless the employer has identified these employees as authorized to speak for the taxpayer), the special rule for employees would not be applicable to those questionable employees. Both pre- and post- contact rules are not followed if the person has indicated that they fear reprisal.

As for identifying current employees who may have a fear of reprisal, if these individuals qualify as being able to speak for the employer, i.e., there is no dispute about whether they are independent contractors and they are contacted during regular business hours on business premises (acting within the scope of their employment), they are not third parties and do not need to be identified on any contact list. If there is some dispute as to whether they are employees and as such we would treat them as third-party contacts, then the reprisal rules would apply to them and we would not have to identify them in a pre-contact notice or a post-contact record.

As for whether the Service can use the information provided by a person who fears reprisal in an RAR, analogies to whistleblower requirements may prove helpful. LMSB's PQAS office issued a memorandum on December 3, 2008, LMSB-4-1108-052 and addressed the protection of a whistleblower's information:

"The identity of persons who furnish information regarding possible tax violations must be protected. All employees must handle such information in strict confidence. Such information must be given special handling to avoid disclosure to anyone other than those employees who have an absolute "need to know". All memoranda of oral interviews with whistleblowers, or any other communications which might, in any way identify whistleblowers, including information provided by the whistleblower, must be sealed and handled in the strictest confidence.

In order to ensure the confidentiality of the whistleblower, it is important that no mention is made of the whistleblower to the taxpayer, in the Revenue Agent Report or in the workpapers. All information related to the whistleblower should be maintained in a whistleblower award claim file which is kept separate from the tax file and other audit workpapers.

It is a longstanding practice of the Service that the identity of a confidential source of information, including a whistleblower, will not be disclosed, except to those officials with a "need to know" in the performance of their official duties. This practice applies whether the request is made under the Freedom of Information Act or in the context of an administrative or judicial proceeding. If anyone outside the Service asks if a whistleblower has provided information impacting the examination, examiners should neither confirm nor deny that a whistleblower is involved in any matter. This response must be provided

in all cases because the knowledge that a whistleblower provided information may, in fact, identify the whistleblower.

In developing issues impacted by information from whistleblowers, examiners should develop the issues by seeking independent corroboration of the information provided by the whistleblower. This independently developed information should form the basis for any proposed assessment of liability."

Some of the same issues arise in the context of a third-party contact who fears reprisal. Consequently, it may be a best practice not to use any information obtained from such a third party directly but rather to use the information to elicit corroborating information from the taxpayer or others.

And lastly, you inquire whether we could provide more information than is requested in a post-notice record since the taxpayer may be able to obtain more information by a FOIA request. [REDACTED]

[REDACTED]